



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 842 OF 2016

ROBERT GISEMBA ONCHANGICLAIMANT

VERSUS

CLERKSON O. BOLO [*t/a Cobo School of Business Studies*].RESPONDENT

J U D G M E N T

I N T R O D U C T I O N

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of service by the respondent on 16/7/2016. Despite service of summons, the respondent never entered appearance and as such the suit was heard ex parte.

(a) whether the termination of the claimant's services was unfair.

(b) Whether the issues for determination here are basically the reliefs sought should issue.

CLAIMANT'S CASE

2. The claimant testified that he was employed by the respondent as a lecturer under a 3 months contract starting 1/11/2014 and ending on 30/1/2015. However from 16/12/2014 he was appointed acting manager until a new manager was appointed. The letter which was erroneously dated 14/12/2012 (instead of 14/12/2014) also extended his contract by two months upto 31/3/2014 (again erroneously instead of 31/3/2015). The letter also entitled him to an acting allowance of ksh10000 per month.

3. After the expiry of the extension period of two months, the claimant continued working and on 1/1/2016, the respondent wrote to the claimant granting him a salary increment from ksh16500 to ksh18000 per month because of his good performance. The letter also informed him that all the other terms and conditions of his employment remained unchanged. However, on 16/7/2016, the respondent locked the claimant out of the office and terminated his service.

4. The claimant contended that the termination was unfair and unlawful because it was without any reason or prior notice and prayed for one month alary in lieu of notice plus compensation for the unfair termination. He also prayed for the accrued leave because he never went for any annual leave during his employment by the respondent. As at the time of his termination he was earning a gross pay of ksh.31000 inclusive of teaching emoluments and allowances.

A N A L Y S I S A N D D E T E R M I N A I T O N

5. There is no dispute that the claimant was employed by the respondent as a lecturer and acting manager as alleged by the claimant. I therefore proceed to answer the twin issues for determination framed above.

Unfair termination

6. Under Section 47(5) of the Employment Act, the burden of proving unfair termination lies with the employee who alleges that he was unfairly terminated. In this case the claimant has given evidence to effect that he was terminated without any prior notice and for no reason. The said evidence has not been contested by the respondent.

7. Under Section 45 (2) of the Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. Fair procedure under Section 41 of the Act entails explaining the reason for intended termination to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice and thereafter inviting the employee and his chosen companion to air their defence for consideration before the termination is decided.

8. In this case the respondent never contested the claimant's evidence that the termination was without prior notice and for no reason. Consequently, I find and hold that the claimant has proved on a balance of probability that his services were unfairly terminated by the respondent within the meaning of Section 45(2) of the Act.

Reliefs

9. Under Section 49 of the Act, I award the claimant ksh.28000 being one month salary in lieu of notice plus ksh.72000 being 4 months salary at the rate of ksh.18000 per month. I have awarded ksh.28000 in lieu of notice because as at the time of the termination the claimant was entitled to his normal salary of ksh.18000 plus ksh.10000 allowance for acting as the manager of the school. On the other hand, I have awarded compensation based on the ksh.18000 salary because that was the rightful salary which he expected to continue receiving even after the extra work of acting manager was taken away. I have also awarded compensation of 4 months salary because the claimant had worked for the respondent for fairly short period.

10. I also award the claimant the salary for the 16 days worked in January 2016 being $ksh28000 \times 16/10 = ksh.14,933.35$.

11. The claim for leave is also granted for the 15 months served equaling to 26.25 days for the 26.25 leave he will get ksh.18,173.10.

12. The claim for gratuity/service pay is however dismissed for lack of evidence. The contract of employment never provided for payment of gratuity and service pay is not payable herein because the claimant was disqualified under Section 35(6) of the Act from earning the same because he was a member of the NSSF courtesy of the respondent's introduction of the claimant to the fund.

DISPOSITION

13. For the reason that the claimant was unfairly dismissed from service, I enter judgment for him in the sum of skh.133,106.45 plus costs and interest.

Dated signed and delivered this 28th July 2017

O.N. MAKAU

Judge